

APPEAL NO. 040887
FILED JUNE 10, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 24, 2004. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on April 14, 2003, in accordance with the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant argues that the hearing officer erred in giving presumptive weight to the designated doctor's report and to his April 14, 2003, date of MMI because the great weight of the other medical evidence is to the contrary. The claimant asks that we render a decision that he reached MMI statutorily on November 30, 2003. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and a new decision rendered that the claimant reached MMI on November 30, 2003.

The parties stipulated that the claimant sustained a compensable injury on _____; that he has an impairment rating (IR) of 13%; and that Dr. S was the designated doctor selected by the Commission. The claimant had his first spinal surgery on April 22, 2002, a hemilaminectomy and discectomy at L5-S1. On September 11, 2002, the claimant underwent a second spinal surgery, neurolysis of the S1 nerve root and a fusion at L5-S1 with instrumentation. On December 18, 2002, the designated doctor examined the claimant and certified that he had not yet reached MMI. On April 14, 2003, the designated doctor reexamined the claimant and certified that the claimant reached MMI as of that date with a 13% IR. On August 6, 2003, the claimant underwent a third spinal surgery for hardware removal, exploration of the L5-S1 fusion, hemilaminectomy at L5-S1, and a neurolysis of the S1 nerve root. The claimant testified that following his third surgery, he was able to complete a course of physical therapy and work hardening and that his condition was greatly improved thereafter. In addition, he stated that he was able to complete a training program to become a long-haul truck driver and testified that he was to begin a job with a trucking company a few days after the hearing in March 2004. The medical records from the claimant's treating doctor and the surgeon who performed the surgeries also demonstrate improvement in the claimant's condition. In a December 17, 2003, report, the claimant's treating doctor noted continued improvement in endurance, functional capacity, and range of motion. Likewise, in a December 16, 2003, report, the surgeon who performed the spinal surgeries noted the claimant was "doing much better" since the third surgery. On February 4, 2004, the claimant's treating doctor released him to medium to heavy work. The Commission sent two letters of clarification to the designated doctor to ask if the claimant's third surgery changed his opinion on when the claimant reached MMI. In his first response, the designated doctor stated that he "saw no indication" for the procedures that were performed on the claimant when he examined him on April 14,

2003, and thus, his opinion continued to be that the claimant reached MMI on April 14, 2003. In response to the second letter of clarification, the designated doctor again stated that his opinion as to the date of MMI remained unchanged based upon his apparent belief that the third surgery was not indicated.

We agree that the hearing officer erred in giving presumptive weight to the designated doctor's report and adopting his April 14, 2003, date of MMI. As noted above, the evidence from the claimant's treating doctor and his surgeon and the claimant's testimony indicate significant and steady improvement following the claimant's third surgery. The claimant's treating doctor released him to medium to heavy work in February 2004, and the claimant testified that he had retrained to become a truck driver following that release and was to begin a job shortly after the hearing. As noted above, in his responses to the two letters of clarification, the designated doctor did not change his opinion based upon his belief that the third surgery was not indicated at the time he examined the claimant on April 14, 2003. The designated doctor did not address the appropriate issue of whether there had been any material recovery or lasting improvement in the claimant's condition following the third surgery. He did not express disagreement with the medical evidence from the treating doctor and the surgeon documenting such improvement and he did not reexamine the claimant to independently determine whether there had been material recovery or lasting improvement. Thus, it seems that the designated doctor improperly focused on whether he thought the third surgery was indicated at the time of the April 14, 2003, examination, rather than actually performing an analysis of whether the claimant's condition improved following the August 6, 2003, surgery. As such, and in light of the uncontroverted evidence from the claimant, his treating doctor, and the surgeon of improvement of the claimant's condition following the third surgery, we believe that in this instance the great weight of the other medical evidence is contrary to the designated doctor's report. Thus, the hearing officer erred in giving that report presumptive weight and in adopting the April 14, 2003, date of MMI. Accordingly, we reverse the determination that the claimant reached MMI on April 14, 2003, and render a new determination that the claimant reached MMI on November 30, 2003.

The hearing officer's determination that the claimant reached MMI on April 14, 2003, is reversed and a new decision rendered that the claimant reached MMI on November 30, 2003.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge